LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 30 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 472

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO., INC.,
Plaintiff-Respondent,

AGAINST

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Defendant-Respondent,

AND

OVE GUSTAVSSON CONTRACTING CO., INC.,
Petitioner and Intervenor-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION

PHILIP G. FITZ,
Counsel for Plaintiff-Respondent,
No. 274 Madison Avenue,
New York 16, N. Y.

WILLIAM V. HOMANS,
PHILIP G. FITZ,
Of Counsel.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth 2-0689

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented by Petitioner	2
Statutes and Rules Involved	5
Statement of the Case	5
Reasons for Not Granting the Writ	8
Argument in Support of Reasons for Not Granting Writ	9
1. Petitioner never had a right to a trial by jury, moreover it effectively waived a jury trial	9
2. In any event, intervenor, having accepted the benefit of intervention granted by Judge Mishler's order, cannot now be heard to appeal from it	15
3. The questions presented are on alleged errors of law of private concern only	17
4. No conflict of decision exists	17
CONCLUSION	19

PAGE

APPENDIX:

Rule 24—Intervention 1a

Rule 38—Jury Trial of Right 3a

Rule 39—Trial by Jury or by the Court 4a

Rule 52—Findings by the Court 5a

CASES CITED

Alston v. Federal Power Commission, C. C. A. 10, 1943, 137 F. 2d 55 14

Cameron v. Harvard, C. C. A. R. I. 1946, 157 F. 2d 993 14

Cohen v. Cohen, 3 N. Y. 2d 339 15

Colquette v. Crossett, 149 F. 2d 116 (C. C. A. 8th) 16

Cowan v. Tipton, D. C. E. D., Tenn., 1 F. R. D. 694 14

Hirschorn v. Mine Safety Appliances, C. C. A. 3, 193 F. 2d 489 14

Kaiser v. Standard Oil Co., 89 F. 2d 58 (C. C. A. 5th) 16

Kass v. Baskin, 164 F. (2d) 513 12

Kearney v. Case, 79 U. S., 12 Wall. 275 14

Magnum Co. v. Coty, 262 U. S. 159 18

Perego v. Dodge, 163 U. S. 160 14

PAGE

Simms v. Andrews, C. C. A. 10, 118 F. 2d 803 13

Thompson v. Broadfoot, C. C. A. N. Y., 1948, 165 F. 2d 744 14

U. S. v. Hougham, 5 L. Ed. 2d 8, p. 888 15

U. S. v. Phillips, 1901, 107 F. 824 14

STATUTES AND RULES CITED

Rule 24(a)(b)(c) of the Federal Rules of Civil Procedure 5, 9, 11, 12, 14

Rule 38 of the Federal Rules of Civil Procedure 5, 14, 15

Rule 39 of the Federal Rules of Civil Procedure 5, 14

Rule 52 of the Federal Rules of Civil Procedure 5

The Miller Act, 40 U. S. C. A., Sections 270a and 270b 5

28 U. S. C. A., §1291 14

AUTHORITIES CITED

Moore's Manual §14.05[4], p. 954 13

Moore's Manual §14.05[4], p. 952 14

Moore's Vol. 7, §73.04, p. 3127 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 472

THE UNITED STATES OF AMERICA for the use and benefit of BROWNE & BRYAN LUMBER CO., INC.,
Plaintiff-Respondent,

AGAINST

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Defendant-Respondent,

AND

OVE GUSTAVSSON CONTRACTING CO., INC.,
Petitioner and Intervenor-Appellant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (p. 11a, Appendix of Petition) granting judgment after trial for plaintiff is reported at 195 F. Supp. 26. The unanimous opinion of the

Court of Appeals for the Second Circuit, affirming the judgment of the District Court (p. 30s, Appendix of Petition) is reported at 303 F. 2d 823. Petition for rehearing was denied on July 3, 1962.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented by Petitioner

We are unable to accept the questions formulated by petitioner as correctly representing the issues of this case.

Petitioner's question "1" contains, contrary to the facts, as a key assumption, that a jury trial was taken from it by judicial direction.[1, 2] Petitioner's question does not state, understandably, whether petitioner entered the case by way of subdivision (a) of Rule 24 of the Federal Rules of Civil Procedure dealing with **"Intervention of Right"** or subdivision (b) of said rule dealing with **"Permissive Intervention"** (1a).

---

[1] References followed by "s" are to appendix to petition. References followed by "a" are to appendix hereto.

[2] The order of Judge Mishler, made upon petitioner's motion to intervene, more than 8 months after the commencement of the action, did not deny petitioner a jury trial but only required petitioner to waive a jury trial if it elected to *intervene* in this action at such late date. The issues raised by the intervention could have been raised in any other independent action brought by petitioner *"without unduly delaying or prejudicing the adjudication of the rights of plaintiff"* (the test set out by Rule 24(b) for permissive intervention (1a).)

Similarly, petitioner's question "2" makes the basic and incorrect assumption, contrary to express findings,[3] [4] that the courts below "disregarded the evidence of both sides * * * " and that "there was a disregard of uncontradicted evidence proving use-plaintiff's failure to perform according to the contract terms".

---

[3] The opinion of Judge Byers is respectfully referred to, where at 23s, rather than disregarding the evidence he considered it and made findings contrary to petitioner's contentions, and at 24s where he found petitioner's testimony with respect to some phases of its counterclaim "entirely unconvincing" and characterized the testimony of petitioner's chief witnesses as "synthetic" and at 28s where petitioners' testimony "strains the Court's credulity" and at 29s where he characterized evidence offered by petitioner as a "remote afterthought, created elsewhere than in Gustavsson's office" and evaluated the evidence offered by petitioner with the observation: "Taken as a whole, the defendant's testimony is entirely unconvincing as to the plaintiff's failure to perform its contract."

[4] The opinion of the Court of Appeals is likewise respectfully referred to where at 36s it observed: "* * * With respect to petitioner's evidence, the most charitable view of what Judge Byers thought of the Saladino Log and Exhibit K, strongly relied on by Gustavsson on this appeal, is that they were wholly unreliable supports for Gustavsson's fantastic claims" and at 37s where the Court of Appeals unanimously stated: "In view of the general atmosphere of confusion that seems to have settled on this case, as revealed in the numerous briefs, letters and memoranda filed with us prior and subsequent to the oral argument, and the persistence with which counsel for Gustavsson has made various and sundry representations and claims to the effect that the rejection of Gustavsson's counterclaim is unjust and not to be sustained on the law or the facts, we have been at particular pains to study the whole transcript of the trial and the exhibits, as well as the briefs, letters and memoranda. The result is that we are convinced by the record as a whole that there is no basis upon which we could set aside any of the findings as clearly erroneous. Indeed we do not see how the trial judge could very well have arrived at a different conclusion." * * * and "No credible evidence was submitted by Gustavsson to establish the amount of delay attributable to the Lumber Company or to establish any damages arising out of such delay."

The questions presented are:

1. Where the granting of petitioner's motion in the District Court for leave to intervene was discretionary under the circumstances existing, was the requirement that a jury trial be waived a proper condition for permitting intervention, and in any case, having availed itself of the privilege of intervention and having waived a jury trial may the petitioner (intervenor) now recant such waiver and challenge the order granting leave to intervene?

2. Is the trier of the facts bound as a matter of law to accept testimony, whether it be controverted or not, that does not satisfy his mind, that he finds to be "synthetic" and "unconvincing" or shall due regard be given to the opportunity of the trial judge to judge of the credibility of the witnesses as is provided by Rule 52(a) of the Federal Rules of Civil Procedure (5a)?

3. Where the reviewing court upon a review of the record, including the entire transcript of the trial and the exhibits, etc. with the result that it found intervenor's counterclaim "inflated" and "unsubstantiated" (39s) and stated that it was "convinced by the record as a whole that there was no basis upon which we could set aside any of the findings as clearly erroneous. Indeed we do not see how the trial judge could very well have arrived at a different conclusion" (37s), will this Court accord the petitioner still another opportunity to present its "synthetic" and "unsubstantiated" claims for further evaluation?

Statutes and Rules Involved

Rule 24(a)(b)(c) of the Federal Rules of Civil Procedure. (1a).

Rule 38 of the Federal Rules of Civil Procedure (3a).

Rule 39 of the Federal Rules of Civil Procedure (4a).

Rule 52 of the Federal Rules of Civil Procedure (5a).

The Miller Act, 40 U. S. C. A., Sections 270a and 270b (46s-48s).

Statement of the Case [5]

Plaintiff, a lumber dealer, sued defendant bonding company, as surety, upon a payment bond posted under the Miller Act, 40 U. S. C. A. 270a and 270b (46s-48s), for the balance due in the sum of $19,848.25 upon the agreed price of certain lumber sold and delivered between April and August 1959, to petitioner Gustavsson, a principal contractor with the government.[6] Said lumber was actually used on the job for which it was purchased, the repair of a sea wall at the Brooklyn Navy Yard.[7] It is undisputed that the petitioner received its full contract price of $158,768, plus $37,025 in extras, totalling $195,793 from the government, without penalty for delay,[8] and that petitioner failed to pay plaintiff and other suppliers for the materials furnished by them and used on the job.[9]

---

[5] Respondent will be referred to as "plaintiff", petitioner as "petitioner" or "intervenor" and the bonding company as "defendant" or "bonding company" or "surety".

[6] Page 4 of certified record.

[7] Page 13 of certified record.

[8] Pages 1239-1241 of certified record.

[9] Page 1289 of certified record.

The agreed price of the lumber sold and delivered by plaintiff was in the amount of $25,848.25. Intervenor paid plaintiff $6,000 on account, $2,000 of which was paid after nearly all the lumber had been delivered and $4,000 of which was paid in two equal payments long after all of the lumber had been delivered. These payments were made in response to frequent demands made by plaintiff, which were not responded to on the excuse that intervenor was not receiving prompt payments from the Navy Department (19s). Plaintiff's profit, if the whole bill were paid, would have been about $1,500.[10]

Payment of the balance due not being forthcoming from the contractor-intervenor, plaintiff addressed a letter to defendant bonding company on January 5, 1960 advising that a substantial quantity of the material sold to the intervenor was still unpaid for. The defendant bonding company answered such letter on January 12, 1960 in its relevant part as follows:

> "I have been informed that our principal is in no financial difficulty and that this indebtedness will be cleared up in due course" (26s).

Payment not being thereafter forthcoming plaintiff commenced this action against the defendant on the Miller Act bond on April 6, 1960. After many generously spaced extensions of time to answer granted to Anthony B. Cataldo, Esq., petitioner-intervenor's personal counsel, who was acting for the defendant surety, he interposed a catchall answer on defendant's behalf on August 30, 1960 containing a general denial and five separate defenses including a defense alleging that plaintiff defaulted on and breached its contract to deliver lumber to petitioner by late deliveries and by delivering damaged, un-

[10] Page 1545 of certified record.

fabricated and raw lumber. No jury trial was demanded by Mr. Cataldo on behalf of defendant (p. 1670 of certified record).

Thereafter pre-trial depositions were completed by the parties, Mr. Cataldo representing the defendant, and plaintiff filed its note of issue and statement of readiness on November 15, 1960.

The District Court thereafter called the case for pre-trial. Upon pre-trial before Judge Bartels an order was made placing the case on the "trial calendar for the week of January 19, 1961, the case to be tried when reached" (p. 1698 of certified record).

Thereafter an order was made by Judge Mishler upon the application of petitioner as a proposed intervenor, 8 months after the commencement of the action, for leave to intervene "in accordance with Rule 24 of the Rules of Federal Civil Procedure" and assert a plea or counterclaim. The proposed intervenor's plea attached to its motion papers for leave to intervene recited a demand for jury trial.

Since it was pointed out to Judge Mishler, before whom the motion for leave to intervene was heard, that the case had already reached such posture that a trial on the non-jury calendar was imminent and that the adjudication of the rights of plaintiff, as one of the original parties contemplated by Rule 24(b) of the Federal Rules of Civil Procedure (1a) would be prejudiced by removing the case from its position on the ready calendar for trial without jury, he granted the motion for leave to intervene upon condition that the proposed intervenor waive a jury trial (9s). The intervenor, by written waiver waived trial by jury (10s) and served and filed its counterclaim by Anthony B. Cataldo, Esq. The defendant, also by An-

thony B. Cataldo, Esq, then served, by leave of court, an amended answer likewise containing no demand for jury (p. 1744 of certified record).

Intervenor took no appeal from the order granting intervention. It participated in further pre-trial discovery relative to its counterclaim [11] and announced itself ready when the case was assigned for trial and participated in the trial [12] and asserted and offered proof of its counterclaims. It was represented throughout by Mr. Cataldo who as well represented defendant.

After twelve non-consecutive days of trial, Judge Byers, the trial judge, rendered a carefully analyzed, detailed and exhaustive decision (11s) 195 F. Supp. 26, directing the dismissal of petitioner's counterclaim (except for a set-off of $388.50) with judgment to be entered for the plaintiff against the defendant in the amount of $19,459.75 together with interest and costs to be taxed.

Thereafter intervenor appealed such decision and the Court of Appeals for the Second Circuit affirmed (30s) 303 F. 2d 823.

Reasons for Not Granting the Writ

First. Petitioner has failed to show the existence of special and important reasons for the review by this Court of the judgment here involved;

Second. Entirely apart from the invalidity of petitioner's contentions, this case is clearly not appropriate for certiorari. The questions presented are on alleged

[11] Page 1802 of certified record.

[12] Page 2 of certified record.

errors of law of private concern only to the litigants involved and the judgment against the intervenor is only of economic concern to itself;

THIRD. Although petitioner claims inconsistently that the decision of the "Court of Appeals * * * decides an important Federal law in a way in conflict with the applicable decisions of this Court or which perhaps, has not been precisely before this court and should be settled by this court" there is in fact not shown to be any departure from any applicable decision of this court or any conflict of decision. It appears that petitioner is aggrieved by the refusal of the lower courts to adopt petitioner's interpretation of the law or to credit its exaggerated and fanciful claims and petitioner seeks certiorari in order to obtain another hearing;

FINALLY. The decisions of the District Court and the Court of Appeals are in full accord with applicable law and the evidence and are correct.

Argument in Support of Reasons for Not Granting Writ

1. Petitioner never had a right to a trial by jury, moreover it effectively waived a jury trial.

a. Petitioner grounds its argument on the Seventh Amendment of the United States Constitution (44s), claiming it had an absolute right to a trial by jury in this action to recover a sum of money in excess of twenty dollars and that the condition imposed for its intervention in this lawsuit was unwarranted. Petitioner bases its claim to *intervention of right* by virtue of Rule 24(a) of the Federal Rules of Civil Procedure (46s). In this, petitioner imposes on this court and misrepresents the facts.

The time elapsed between the commencement of this action on April 6, 1960 and the joining of issue on August 30, 1960 were not spent in negotiating a settlement as petitioner states, rather they were consumed in stalling plaintiff and in avoiding payment of its bill by conducting tongue-in-cheek negotiations and concocting fanciful counterclaims asserted as defenses in defendant's answer and then later asserted as counterclaims upon petitioner's motion for leave to intervene returnable November 25, 1960, three months later than the filing of defendant's answer.

Since it was petitioner's personal counsel, Anthony B. Cataldo, Esq., who, upon his request to the defendant surety company was retained to interpose an answer on the surety company's behalf,[13] it appears that having pleaded the same subject matter as defenses, the intervention might have been sought earlier. The delay therefore in seeking intervention seems intentionally used as a further dilatory tactic as the Court of Appeals observed (35s):

---

[13] At page 1657 of the certified record we find the colloquy:

"Mr. Cataldo: I represent Gustavsson. I do not represent the Bonding company, I represent Gustavsson——

The Court: Why do you suppose Gustavsson retained you?

Mr. Cataldo: Why?

The Court: Yes.

Mr. Cataldo: Because he retained me. He didn't—the company did not retain me. The company—I asked the company to retain me so I could save the expense to Gustavsson.

The Court: That is what I thought.

Mr. Cataldo: So I could save the expense to Gustavsson, but I want to tell your Honor, I haven't received a fee from Mr. Gustavsson for the last eighteen months. The man hasn't had any money. He has had difficulty trying to pay all these bills.

Mr. Homans: What did he do with the $100,000 profit?

The Court: He got all his money from the Government.

Mr. Cataldo: I beg your pardon, sir?"

Petitioner here states that its motion to intervene was pursuant to Rule 24(a) of the Federal Rules of Civil Procedure which deals with *Intervention of Right*. Petitioner fails to state that its notice of motion to intervene recited that it was made in scattershot "as provided by Rule 24 of the Rules of Federal Civil Procedure" [14] without specification of whether subdivision (a) or (b) of said rule was invoked and that Ove Gustavsson's affidavit on the motion stated, *inter alia*, "in accordance with Rule 24 a and b, intervenor should be permitted to intervene in this action * * *" [15]

While petitioner's motion for intervention when made recited the authority therefor as both the mutually exclusive subdivisions (a) and (b) of Rule 24 of the Federal Rules of Civil Procedure an analysis of the situation as it existed at the time indicates clearly that the only avenue to intervention open to intervenor was the permissive provisions of subdivision (b) (1a).

Petitioner as an applicant intervenor did not fit within the narrow confines of subdivision (a) **Intervention of Right**. (1) No statute conferred an unconditional right to intervene; the representation of the applicant's interest was not inadequate since it was by its own personal counsel; there was no property in the custody or control of the court or an officer to be distributed.

We are not faced here with a case where by some contract or agreement, representation is foisted or forced upon a proposed intervenor by a strange or unsympathetic counsel, whose interest, or the interest of his actual client, might not coincide with intervenor's. Here, the representation of the defendant bonding company was actually in the

[14] Page 1080 of certified record.

[15] Page 1088 of certified record.

interest of intervenor. Any benefit gained by the defense would ultimately benefit intervenor by a reduction of its ultimate liability as principal to its surety. Further, the elements of intervenor's counterclaims were identical with the defenses of the defendant interposed without demand for jury by Mr. Cataldo. The litigation of those defenses claimed by defendant surety as set-offs against plaintiff's claim involved the same issues presented by Mr. Cataldo upon the intervention. Can it then be said that the representation of applicant's interest by existing parties was inadequate? What more adequate representation could intervenor have desired than that of its own attorney upon the very issues raised by its plea?

The intervenor therefore came to the District Court as an applicant for **Permissive Intervention** under subdivision (b) of Rule 24. Such being the nature of the application, the District Court was clothed with discretion and mandated to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties", (last sentence of Rule 24(b) (1a)). Judge Mishler correctly exercised that discretion upon being shown that a jury trial would create delay and result in prejudice to plaintiff since the case would have lost its already pretried status and would have had to be removed from the ready non-jury docket for trial.

Judge Mishler's decision was in line with the proper considerations for the relief requested as expressed in *Kass* v. *Baskin*, 164 F. (2d) 513, where the Court of Appeals for the District of Columbia stated at page 515:

> "The second question in the case concerns the considerations which should control the court in the exercise of its power to grant a jury trial after the parties had foregone their rights to demand one. One view is that unless the court finds that a jury

> trial would prejudice the plaintiff, it must grant the defendant's demand or motion for such trial. The other view is that the court may consider and act upon any and all pertinent factors in the case, including particularly the nature of the issues presented by the pleadings and the general orderly disposition of the court's business. We think that the latter is the correct rule. * * * "

and at page 516, the court continued:

> "A few minute's delay, during which no substantial action is taken by the court or the opposing litigant, is one thing; a delay of more than a month, during which the case is set for trial on the non jury docket and the opposing litigant presumably prepares his case on that basis is a very different thing."

No abuse of discretion is shown in Judge Mishler's imposition of the waiver of jury trial for this permissive intervention under the circumstances of there having been already had discovery, pre-trial and ready calendar status for trial for the week of January 19, 1961 (pre-trial order, p. 1698 of certified record) since timeliness is a matter within the sound discretion of the trial court. Moore's Manual, 14.05[4], p. 954; *Simms* v. *Andrews*, C. C. A. 10, 118 F. 2d 803.

b. Petitioner has effectively waived a trial by jury. Petitioner contends that a jury trial was taken away from him, that it was not waived despite the express written waiver (10s) made following Judge Mishler's grant of intervention (9s).

No appeal was taken from Judge Mishler's order, although it was appealable; if as petitioner now claims, its

intervention was a matter of right. 28 U. S. C. A., §1291; *Thompson* v. *Broadfoot*, C. C. A. N. Y., 1948, 165 F. 2d 744; *Cameron* v. *Harvard*, C. C. A. R. I. 1946, 157 F. 2d 993; *Alston* v. *Federal Power Commission*, C. C. A. 10, 1943, 137 F. 2d 55; *U. S.* v. *Phillips*, 1901, 107 F. 824; *Hirschorn* v. *Mine Safety Appliances*, C. C. A. 3, 193 F. 2d 489.

Intervenor entered the case, served its plea or counterclaim without further demand for jury, participated in discovery proceedings, and fully participated in the trial asserting its counterclaims.

If petitioner as an intervenor had any right to a jury trial it was effectively waived. *Kearney* v. *Case*, 79 U. S., 12 Wall. 275; *Perego* v. *Dodge*, 163 U. S. 160, 166.

The only jury demand ever made in this case was upon a *proposed* pleading accompanying petitioner's motion as an *applicant* for permissive intervention seeking party status. Rule 38(a) and (b) of the Federal Rules of Civil Procedure which deals with **Jury Trial of Right** (3a) did not yet apply to petitioner since it was not yet a *party*. Nor does Rule 24 (a) or (b) (1a) dealing with intervention so designate a proposed intervenor as a *party*. An order was required to accomplish such status. Moore's Manual, §14.05[4], p. 952; *Cowan* v. *Tipton*, D. C. E. D., Tenn., 1 F. R. D. 694. Nor was the proposed intervenor's plea yet a pleading within the contemplation of Rules 38 and 39 of the Federal Rules of Civil Procedure (3a, 4a).

After the intervention was granted on January 16, 1961 the pleading served by intervenor contained no demand for jury.[16]

---

[16] Page 1731 of certified record.

2. In any event, intervenor, having accepted the benefit of intervention granted by Judge Mishler's order, cannot now be heard to appeal from it.

Despite the safeguards in the Constitution and the Rules of Civil Procedure preserving the right of jury trials, the right to a jury trial, if it exists in any case, is personal to a litigant, who may waive it by his action or nonaction. Federal Rules of Civil Procedure, Rule 38(d)(a), Rule 39(a) (3a).

Intervenor effectively waived a jury trial by its express waiver dated January 17, 1960 (10s) and again after it attained party status, by failure to demand a jury with its plea,[16] and again when it proceeded to a trial without a demand for jury. Judge Mishler did not deny intervenor a day in court for it to be claimed by petitioner at page 15 of its petition that a jury trial was taken away from him by an involuntary waiver forced upon him by judicial decree. Nobody stayed intervenor from any appeal to which it felt itself entitled. Petitioner made its choice to intervene despite its purported reservation of rights (10s). It apparently "wanted to have its cake and eat it too", if we may be permitted an apt expression. It has been held that the acceptance of the benefits of one part of a judgment or decree precludes appeal from the other parts.

> *U. S.* v. *Hougham*, 5 L. Ed. 2d 8, p. 888, 897, 905;
> *Cohen* v. *Cohen*, 3 N. Y. 2d 339, 346.

In the *Cohen* case, the Court of Appeals of New York State at page 346 stated:

> "'[4] Of course the general rule that a party who accepts the benefits of a judgment or order waives

[16] Page 1731 of certified record.

his right to appeal from it (see Matter of Silverman (Hoe & Co.), 305 N. Y. 13, 17, 110 N. E. 2d 402, 403; Cohen and Karger, op. cit., p. 406) applies to appeals taken under Section 580. We can find no evidence in the record, however, to support the conclusion of the Appellate Division that the husband 'accepted the benefit conferred by the order'."

* * * * *

"In any event, the husband never exercised these rights, and the mere existence of a right to claim certain benefits, without the acceptance of those benefits, does not result in a waiver of the right to appeal."

Moore's Vol. 7, §73.04, p. 3127;
Colquette v. *Crossett*, 149 F. 2d 116, 118 (C. C. A. 8th);
Kaiser v. *Standard Oil Co.*, 89 F. 2d 58 (C. C. A. 5th).

Having accepted the full benefit of intervention petitioner waived any right to appeal from Judge Mishler's order to the Court of Appeals for the Second Circuit. Its further plea to this court for certiorari upon the same grounds is baseless and no more than an overpersistent attempt to obtain another hearing.

The purported reservation of rights included in the written waiver was apparently merely a gesture. It was not implemented by any steps toward appeal, but rather any right to an appeal, if it was created by such waiver, was waived as well by petitioner's non-action.

Moreover the *waiver* of any right to appeal, if such right was created by petitioner's gratuitous reservation of rights, was confirmed not only by petitioner's failure to

timely appeal, but also by its failure to demand a jury when it reached party status, either on a pleading or by separate demand, and by its failure to demand a jury at opening of the trial as well as by its full participation throughout the trial.

3. The questions presented are on alleged errors of law of private concern only.

The private dispute between these litigants can be of concern only to themselves and their counsel. The decision below turns upon its own peculiar facts and it is highly unlikely that these unusual facts will recur in relation to the propositions of law here involved.

No broadly social judgments are here under review. This is not a case which presents questions whose resolution will have immediate importance far beyond the particular facts and parties involved or tremendously important principles upon which are based the plans, hopes and aspirations of a great many people throughout the country.[17] In fact the question of jury trial was limited in its decision by the Court of Appeals to the "peculiar circumstances of this particular case * * *." (42s).

4. No conflict of decision exists.

The petition fails to disclose any conflict of decision. The cases cited by petitioner are inappropriate to the issues presented. Petitioner failed to persuade the District Judge and the three judges of the Court of Appeals upon appeal and petition for reargument to adopt its view of the law and facts. Nevertheless petitioner continues to urge its differing view of the law and its uncredited ver-

[17] Address of Chief Justice Vinson before American Bar Association, September 7, 1949, St. Louis Daily Record (Sept. 8, 1949, p. 1).

sion of the facts as the basis for its claimed conflict of decision.

It is apparent that what petitioner really seeks is another hearing. This Court has declared that the jurisdiction of this Court to review cases by way of certiorari was not conferred merely to give the defeated party in the Court of Appeals another hearing. *Magnum Co.* v. *Coty*, 262 U. S. 159, 163.

Petitioner seems chagrined at the criticism of both courts below as to the quality of petitioner's evidence as well as the tactics it employed. To be sure such observations as were made by the courts below were not made lightly.

It is regrettable that in its zeal to obtain another hearing petitioner finds it necessary to again deal loosely with the facts. We have had occasion in the courts below to call attention to glaring and understandably undocumented and unsupported statements of petitioner dealing inaccurately with the facts as well as petitioner's penchant for characterizing its strange version of the facts as "uncontradicted", "conceded" and the like. We do not deem it necessary to burden this Court by again citing chapter and verse of the proof of falsity of the many statements of alleged fact advanced by petitioner. We deem it sufficient to rely upon the findings of the District Court as expressed in Judge Byer's decision (11s) and their appraisal by the Court of Appeals after a review of the entire record as follows:

> "Indeed, we do not see how the trial judge could very well have arrived at a different conclusion" (37s).

It is also regrettable that in its zeal to accomplish its aim, petitioner finds it necessary to accuse the Court of

Appeals of "shedding a crocodile tear for a constitutional guarantee" and that it "wanted to punish the petitioner" (p. 11, first complete paragraph of Petition after quotation).

This is all the more regrettable when it is considered that petitioner has accused said court of refusing "to be governed by the constitution" and setting itself up above the constitution (p. 12 of Petition).

However, the integrity and reputation of this distinguished court are established beyond the reach of slurs or the need for defense.

CONCLUSION

The decision below is correct and involves neither a conflict of decision nor any question that should be settled by this Court nor a question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, New York, New York, November 29, 1962.

PHILIP G. FITZ,
Counsel for Respondent.

WILLIAM V. HOMANS,
PHILIP G. FITZ,
Of Counsel.

APPENDIX

Rule 24

Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or of an officer thereof. [As amended Dec. 27, 1946, effective March 19, 1948.]

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [As amended Dec. 27, 1946, effective March 19, 1948.]

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. §2403. [As amended Dec. 29, 1948, effective Oct. 20, 1949.]

VI. TRIALS

Rule 38

Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Rule 39

Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 52

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). [As amended Dec. 27, 1946, effective March 19, 1948.]

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.